

# **Strategic Stakeholder Engagement in Drafting a National Policy on Arbitration**

**By**

**Prof Paul Idornigie, SAN, PhD,  
FCI Arb, Chartered Arbitrator  
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# Outline of Presentation

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- The Role of the Judiciary
- Drafting a National Policy on Arbitration
- We have Qualified Arbitrators in Africa
- We have Arbitral Institutions
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# Introduction

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- Arbitration has become a preferred means of settlement of pure commercial disputes
- It can be domestic or international on the one hand and *ad hoc* or institutional on the other
- Arbitration anchored on fundamental principles:
  - Principle of party autonomy
  - Principle of Arbitrability - objective and subjective

## ..... Introduction

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- Principle of separability
  - Competence of the Arbitral Tribunal to rule on its jurisdiction
  - Principle of minimal judicial intervention
- In this presentation, we will interrogate how we can strategically engage stakeholders in developing a National Policy on Arbitration

# Legal Framework for Arbitration in Nigeria

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- Customary Arbitration
- Statutory Arbitration
- Treaty Arbitration
- The Laws, Treaties and Model Laws -
  - Arbitration and Conciliation Act, 2004 modelled after the UNCITRAL Model Law of 1985
  - The Lagos State Arbitration Law, 2009 (incorporates the UNCITRAL Model Laws of 1985 and 2006)

## .....Legal Framework

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- Arbitration Laws of the remaining 35 States
- High Court (Civil Procedure) Rules of the various States
- Multi-door Courthouses Laws of various States eg Lagos
- The Lagos Regional Centre for International Commercial Arbitration Act, 1999
- The 1958 NY Convention on Recognition and Enforcement of Foreign Arbitral Awards
- The 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States

## .....Legal Framework

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- The International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, 1967
- Nigeria has over six recognized arbitral institutions
  - Thus Nigeria, a Model Law Country and a signatory to the 1958 and 1965 New York and Washington Conventions respectively
  - Ideally, therefore, Nigeria should be a destination for arbitration

# Negotiating and Drafting Contracts and Treaties

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- Negotiation is about allocation of risks and responsibilities
- Which risks should the Government assume and those transferred to the investor?
- Drafting the Dispute Resolution Clause
- Determining the Governing Law of the Contract bearing in mind the principle of separability
- Determining seat and place of arbitration
- Language
- We have a template for IIAs - BITs only, we need one for other treaties and contracts especially the boiler plate provisions



## ..... Negotiating and Drafting Contracts and Treaties

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- The problem is not that of arbitration *per se* but the underlying contract - the substratum
- We must get the terms and conditions of the contracts right
- We must get the warranties, indemnities, etc right
- The dispute resolution clause is just a clause in the contract - **the midnight clause**
- If we get the substratum right, there may be no dispute

# The Role of the Judiciary

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- The Courts cannot interfere unless as provided by the ACA (s34)
- Before, during and post-award (ss4, 5, 7, 9, 29,30,31,32,48,51,52 of the ACA)
- Statutorily, these are similar to the provisions found in other jurisdictions and UNCITRAL Model Law
- The Practice Directions on Arbitration Clause in Commercial Contracts by Hon Justice Water S N Onnoghen, the former Hon Chief Justice of Nigeria/Chairman of the Board of Governors of the National Judicial Institute of 26<sup>th</sup> May, 2017 addressed to All Heads of Courts in Nigeria.
- Note: *IPCO v NNPC* and delays in Nigerian courts.

# Drafting a National Policy on Arbitration

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- Emphasize the importance of the underlying contract, the substratum
- Ensure that foreign companies coming to Nigeria to do business register as Nigerian companies (s78 of CAMA, 2020) and also register with NIPC (s20 NIPC Act)
- Draft Template for various commercial transactions like the one for Bilateral Investment Treaties (BITs)
- Draft Model Dispute Resolution Clauses for Negotiation, Mediation/Conciliation and Arbitration and use of boiler plate provisions
- Ensure that Nigeria is the seat/place of Arbitration. Seat/place of arbitration should not be confused with venue for hearing.
- The Role of the Judiciary - before, during and post-award

# We have Qualified Arbitrators in Africa

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- In early 2018, SOAS, University of London, published the *SOAS Arbitration in Africa Survey 2018*.
- The team was led by Dr Emilia Onyema. The thrust of the Survey was to address the perception that African arbitration practitioners were not competent and skilled enough to be appointed arbitrators in international arbitration.
- **Consequently, arbitrations arising from Africa were settled by non-Africans and outside Africa.**
- This perception was based on 'anecdotal evidence' and not empirical evidence.
- The Survey attracted respondents from 191 respondents from 19 African and 12 non-African countries, 90.6% of the respondents were lawyers and 83.8% described themselves as arbitration practitioners.

## ..... We have Qualified Arbitrators in Africa

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- Although more arbitration practitioners have experience in domestic arbitration in comparison to international arbitration, the top three reasons for the under representation in international arbitration are: **poor perception of African arbitration practitioners as lacking experience and expertise; bias by appointors in favour of foreign arbitrators; and Africans not appointing fellow Africans as arbitrators.**
- **Among other key findings, the Survey showed clearly that a significant majority of African arbitration practitioners are formally trained in arbitration and hold memberships of arbitration associations.**
- Nigeria had the highest number (61.8%) of active African arbitration practitioners who are qualified to practice in African jurisdictions, followed by South Africa (8.9%) and Ghana (4.2%).
- In CIArb, we have Chartered Arbitrators: Nigeria 20, Kenya 23, SA 1.

# We have Arbitral Institutions/Centres in Nigeria and 91 in Africa

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- We have at least six Arbitration Centres in Nigeria, namely,
  - Lagos Regional Centre for International Commercial Arbitration
  - Lagos Court of Arbitration Centre
  - Lagos Chamber of Commerce International Centre for Arbitration
  - Maritime Arbitrators Association of Nigeria
  - International Centre for Arbitration and Mediation, Abuja
  - Jinada International Centre for Arbitration and Mediation, Abuja

# Concluding Remarks

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- In a domestic reference, the issue of seat of arbitration (legal seat not physical location of oral hearing) is not fundamental as Nigeria will be the seat.
- The choice of a seat of arbitration may determine
  - the law governing the procedure, as opposed to the substance of the arbitration;
  - the national courts that have a supportive and supervisory jurisdiction over the proceedings, including jurisdiction to hear an application to set aside the award; and
  - affect the enforceability of an award in another jurisdiction.

## .... Concluding Remarks

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- However in choosing a seat (or place of arbitration) in international arbitration, some factors are critical, namely,
  - how modern is the arbitration law of that country;
  - does the contemplated jurisdiction respect the principle of party autonomy or restrict the role of the local courts;
  - minimize the grounds upon which an award can be set aside;
  - has arbitral centres; and
  - a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award?



## .....Concluding Remarks

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- Nigeria has largely met these requirements and therefore having National Policy on Arbitration will strengthen our position.
- This is without prejudice to the fact that issues of security, facilities, infrastructure, integrity and efficiency of the Nigerian courts may also be factors responsible for the low patronage.
- The Arbitration and Conciliation Act was passed in 1988 and attempts have been made since 2007 to modernize it - there is a 2019 version now before the NASS.
- This Bill has been in the NASS since 2007!

# .....Concluding Remarks

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- We have qualified Arbitrators in Nigeria and arbitral institutions
- We now have the **African Promise** - seeks to increase the number of Africans appointed as arbitrators especially those originating from Africa in order to ensure fair representation and diversity.
- The **African Promise** is effectively a pledge by counsel, corporate end-users, States, arbitral institutions, academics, and others to "improve the profile and representation of African arbitrators especially in arbitrations connected to Africa".
- We must not only 'Africanise' arbitration we must 'Nigerianise' it.

## .....Concluding Remarks

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- The Nigerian Institute of Advanced Legal Studies needs to engage all Ministries, Departments and Agencies through the Federal Ministry of Justice and other strategic stakeholders to develop the National Policy on Arbitration.
- Thank you.